Maryland General Assembly
Department of Legislative Services

Emergency/Proposed Regulations
Department of Planning
(DLS Control No. 14-278)

Overview and Legal and Fiscal Impact

The regulations repeal the seven existing regulations in Chapter 07 (Sustainable Communities Tax Credit Certifications) and substitute new Regulations .01 through .08 while preserving all of the same content areas of the existing regulations. The goal of the regulations is to provide certain clarifications and to conform to the provisions of Chapter 601 (House Bill 510) of 2014, which altered the Sustainable Communities tax credit program by removing certain requirements and making certain small commercial projects eligible to participate.

The regulations present no legal issues of concern.

There is minimal or no fiscal impact on State or local agencies.

Regulations of COMAR Affected

Department of Planning:

Historical and Cultural Programs: Sustainable Communities Tax Credit Certifications: COMAR 34.04.07.01-.08

Legal Analysis

Background

Chapter 487 of 2010 established the Sustainable Communities tax credit program, which was an evolution of the former Heritage Structure Rehabilitation tax credit program that was established in 1996 as part of a larger piece of legislation that targeted heritage preservation and tourism. The Maryland Historical Trust (trust) was designated as the State entity responsible for administering the tax credit. Chapter 487 altered the tax credit to allow certain nonhistoric properties to qualify and extended the program's termination date through fiscal 2014.

Chapter 601 of 2014 extended the termination date of the Sustainable Communities tax credit program through fiscal 2017 for both commercial and owner-occupied residential property rehabilitations. The legislation also (1) repealed the eligibility of certain nonhistoric properties to qualify for a 10% tax credit under the commercial program; (2) established tax credit eligibility for small commercial projects that meet certain requirements; and (3) eliminated the requirement that the program regulations must favor the award of tax credits for commercial projects located in sustainable communities.

A small commercial project is the rehabilitation of a structure primarily used for commercial, income-producing purposes if (1) the qualified rehabilitation expenditures do not exceed $500,000 and (2) the structure is located within a sustainable community. Small commercial projects include mixed use commercial and residential buildings, but structures that are used solely for residential purposes do not qualify. Applicants for a tax credit for small commercial projects must apply to the trust in order to qualify and receive an initial credit certificate. The trust may award a maximum of $4 million in credits for these projects beginning on January 1, 2015. A tax credit for a small commercial project is subject to recapture under certain circumstances.

Summary of Regulations

The regulations repeal the seven existing regulations in Chapter 07 (Sustainable Communities Tax Credit Certifications) and substitute new Regulations .01 through .08. The new regulations preserve all of the same content areas of the existing regulations and add one new regulation (.05) on procedures for certification of completed rehabilitations. The regulations also add two new subsections to an existing regulation to specify the process for recapturing tax credits (was existing Regulation .06, now new Regulation .07). The regulations also add several new definitions that are integral to the requirements of Chapter 601 of 2014, such as "recapture period" and "small commercial rehabilitation."

Prior to the enactment of Chapter 601, initial credit certificates expired and credits could not be claimed if the applicant (1) had not notified the trust in writing within 18 months of credit certificate issuance that the commercial rehabilitation had begun; (2) did not complete the rehabilitation within 30 months after credit certificate issuance; or (3) failed to pay within 120 days the required fee charged to certify the rehabilitation.

Chapter 601 altered these provisions as follows, which are incorporated into the regulations: (1) the trust is authorized, for reasonable cause, to postpone the 18-month and 30-month expiration provisions; (2) the time in which an applicant must pay the required fee charged to certify a rehabilitation is accelerated to 90 days; and (3) initial credit certificates expire if the applicant does not submit to the trust a request for final certification within 12 months after the 30-month expiration provision described above or the date to which the trust postponed the expiration date of the initial credit certificate. For reasonable cause, the trust may postpone this deadline if the commercial rehabilitation was completed prior to the expiration of the initial credit certificate. The trust may not accept an application from a commercial applicant whose credit certificate expired due to nonpayment of the required fee in the three fiscal years following the fiscal year after the certificate expiration.

Section 5A-303(b) of the State Finance and Procurement Article requires the trust, in consultation with the Smart Growth Subcabinet, to adopt regulations necessary to carry out the Sustainable Communities tax credit program. Prior to the enactment of Chapter 601, the trust was required to (1) establish procedures and standards for certifying historic structures and rehabilitations; (2) for commercial rehabilitations, establish an application process for the award of initial credit certificates; (3) for commercial rehabilitations, establish criteria for evaluating, comparing, and rating plans of proposed rehabilitation that have been determined by the trust to conform with the rehabilitation standards of the United States Secretary of the Interior; (4) for commercial rehabilitations, establish a competitive award process for the award of initial credit certificates for Maryland sustainable communities tax credits that favors the award of tax credits for rehabilitation projects that meet certain criteria; (5) for commercial rehabilitations, determine whether the certified rehabilitation is a high performance building; (6) for commercial rehabilitations, establish a required external marker or, at a minimum, an internal marker for the rehabilitation project that identifies that the rehabilitation was funded by Maryland sustainable communities tax credits; and (7) charge reasonable fees to certify historic structures and rehabilitations. With one exception, the regulations continue to include provisions that meet all of these requirements. Chapter 601 eliminated the requirement that the program regulations must favor the award of tax credits for commercial projects located in sustainable communities and the new regulations incorporate that change.

Chapter 601 added several new requirements for the regulations. For commercial rehabilitations, the trust must adopt regulations that (1) require documentation that the applicant has ownership or site control of the structure; and (2) provide a time limit for approval of the additional tax credit available if certain energy efficiency standards are met. For small commercial projects, the trust must adopt regulations that (1) establish conditions regarding the percentage of the structure that may be used for residential rental purposes if the structure is used for both commercial and residential rental purposes; and (2) specify criteria and procedures for the issuance of initial credit certificates. Additionally, the trust must adopt regulations to charge a fee to certify historic structures and rehabilitations which must include (1) a minimum fee for the second phase of the application process; (2) for commercial rehabilitations, a final fee that may not exceed 3% of the amount of the issued initial credit certificate; and (3) for any other rehabilitation, a final fee that may not exceed 3% of the credit for which the rehabilitation would be eligible based on the greater of the estimated or final qualified rehabilitation expenditures for the rehabilitation. The regulations include provisions that address each of these new requirements specified in Chapter 601.

Additionally, Chapter 601 reduced, from 75% to 60%, the maximum amount of total initial credit certificates issued in a fiscal year that can be allocated for projects located in one county or Baltimore City. The regulations incorporate that change.

Legal Issue

The regulations present no legal issues of concern.

Statutory Authority and Legislative Intent

The Department of Planning cites § 5A-303 of the State Finance and Procurement Article as legal authority for the regulations. Section 5A-303(b) requires the trust, in consultation with the Smart Growth Subcabinet, to adopt regulations necessary to carry out the Sustainable Communities tax credit program.

As mentioned above, prior to the enactment of Chapter 601, the trust was required to adopt regulations that addressed seven items and Chapter 601 added several new items that must be included in the regulations. For specifics regarding the required content of the regulations, see the Summary of Regulations section.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Reason for Emergency Status

The department requests emergency status to begin January 1, 2015, and to expire June 30, 2015, to cover the period until the final adoption of the permanent nonemergency regulations. This period is within normal time frames approved by the committee. The department is requesting emergency status because the regulations implement a new Sustainable Communities Tax Credit program for small commercial projects that by law begins on January 1, 2015. If the regulations were adopted through the nonemergency process, the regulations would likely not be finalized and effective until February 2, 2015, at the earliest.

Technical Corrections and Special Notes

The Regulations Coordinator for the Department of Planning agreed to make the following technical corrections.

(1) In Regulation .02B(13), the definition of "high performance building" will be amended to remove the new subsection (c) "a high performance building is eligible for a 5% tax credit when used with the competitive commercial tax credit" because it does not work with the lead in language and it is a substantive provision that should not be included in a definition. The language in Regulation .04D(1)(c)(iii) sufficiently covers this concept.

(2) In Regulation .02B, the definition of "income-producing" in (15) will be deleted (and all subsequent definitions will be re-numbered) and will be combined with the definition of "small commercial rehabilitation" in (27). Also, this definition will be amended to clarify that a residence may qualify as a small commercial rehabilitation as long as it is not solely a principal residence. The amended definition is:

"Small commercial rehabilitation" means the rehabilitation of a certified historic structure that is located in a designated sustainable community and, when placed in service upon completion of the rehabilitation:

(a) is not solely a principal residence;

(b) is primarily used for income-producing purposes; and

(c) no greater than 75% of the habitable interior portions of the structure are used for rental residential purposes.

(3) In Regulation .05A(1) and B, the defined term "certified rehabilitation" will replace the previous term "certified historic structure rehabilitation" because the defined term means a completed rehabilitation of a certified historic structure.

(4) Language was missing in Regulation .06C; therefore, the first sentence will be amended to read "An applicant whose request for reconsideration has been denied or approved with conditions by the Director under §A or §B of this Regulation may file… ."

(5) Language was missing in Regulation .06F; therefore, it will be amended to read:

"The MHT Board of Trustees shall review the request for reconsideration within 60 days after the receipt of the request. If the Board determines that the application filed under Regulation .03, .04 or .05 of this chapter meets the standards set forth in that regulation, the Board shall approve the application. If the Board determines that the application filed under Regulation .03, .04 or .05 does not meet the standards set forth in that regulation, the Board shall deny the request for reconsideration or approve the request with conditions. The Director shall promptly notify the applicant of the Board's determination. The determination of the Board shall be final and not a contested case within the meaning of State Government Article, Title 10, Subtitle 2, of the Code."

(6) Stylistic changes will be made in the following instances:

(a) In Regulation .02B(14), the definition of "historic property" will be amended to have two subsections: (a) will be the "means" part of the definition and (b) will be the "includes" part of the definition;

(b) Regulation .04G will be amended to include a semicolon at the end of each numbered provision; and

(c) The extra letters will be removed in Regulation .06E(1).

There was a discussion regarding whether Regulation .04G(3)(b) is appropriate because Chapter 601 of 2014 removed the requirement for a competitive commercial rehabilitation to be in a sustainable community. After discussion, subsection (b) will be retained in the regulations because the intent of removing this requirement was to broaden the pool of applicants by not making this requirement an absolute bar but instead allowing it to be a factor that may be considered when weighing an application.

Fiscal Analysis

There is minimal or no fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

Chapter 601 (House Bill 510) of 2014 made a number of changes to the sustainable communities tax credit program, including authorizing the trust to award a maximum of $4.0 million in tax credits for the rehabilitation of structures primarily used for commercial, income-producing purposes if the qualified rehabilitation expenditures do not exceed $500,000 and the structure is located within a sustainable community. Chapter 601 required the trust, in consultation with the Smart Growth Subcabinet, to adopt regulations (1) establishing the percentage of the structure that may be used for residential purposes if the structure is a mixed-use purpose building and (2) specifying criteria and procedures for the issuance of initial credit certificates.

As the regulations primarily incorporate the provisions of Chapter 601 related to sustainable community tax credit eligibility for certain small commercial projects, the department advises that the regulations have minimal or no economic impact. The Department of Legislative Services concurs and notes that the impact has already been accounted for in the fiscal and policy note for House Bill 510.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The department advises that the regulations have a meaningful beneficial impact on small businesses. The Department of Legislative Services disagrees and notes that any impact has already been accounted for in the fiscal and policy note for House Bill 510.

Contact Information

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